IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

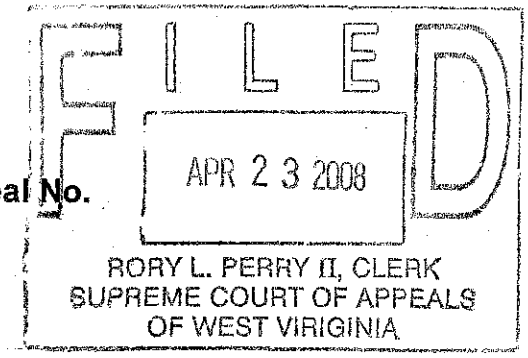
WEST VIRGINIA PAVING, INC.,

Defendant/Petitioner,

v. **Appeal No.**

C & O MOTORS, INC.,

Plaintiff/Respondent.



RESPONSE TO PETITION FOR APPEAL

Comes now the Respondent, Plaintiff below, C&O Motors, Inc. (hereinafter "Respondent" or "C&O"), by counsel, SWARTZ LAW OFFICES, PLLC, pursuant to Rule 3(f) of the West Virginia Rules of Appellate Procedure, and respectfully presents this Response to the Petition for Appeal for consideration by this Honorable Court.

PROCEDURAL HISTORY

C&O filed a Complaint in the Circuit Court of Kanawha County, West Virginia, on February 15, 2006, seeking damages in the amount of $20,000.00 in regards to its allegations that West Virginia Paving, while performing a paving operation, negligently caused tar and other debris to splatter on Plaintiff's vehicles on the car lots abutting Route 60 in St. Albans, West Virginia.

West Virginia Paving filed a *Motion for Joinder of Persons Needed for Just Adjudication Pursuant to Rule 19 of the Rules of Civil Procedure,* "on the grounds that the alleged deposition of foreign material on the Plaintiff's subject vehicles, was, more than likely, done by the entity known as Coady Construction, Inc.

pursuant to a subcontract with the Defendant, West Virginia Paving, Inc. who was operating as General Contractor, under a contract with the State of West Virginia, Department of Transportation, Division of Highways for the milling and resurfacing of State Route 60, located along the Respondent's boundary in the City of St. Albans, Kanawha County, West Virginia".

The Circuit Court denied West Virginia Paving's motion for joinder, found there were no genuine issues of material fact or law, and granted summary judgment in favor of C&O by Order dated May 1, 2007.

FACTS

1. Respondent, C&O Motors, Inc., is a West Virginia corporation with its principal place of business at 202 5th Street, St. Albans, West Virginia. C&O is a motor vehicle dealer.

2. Petitioner, West Virginia Paving, Inc. ("West Virginia Paving") is a West Virginia corporation with its principal place of business at 2950 Charles Avenue, Dunbar, West Virginia.

3. C&O has several car lots displaying new and used vehicles located along Route 60, McCorkle Avenue in St. Albans, West Virginia.

4. From April 25 through May 9, 2005, West Virginia Paving engaged in a paving project along Route 60, McCorkle Avenue, St. Albans, West Virginia. It was a night job.

5. A typical West Virginia Paving project has approximately seven (7) employees on a crew. On this particular project there were 2 or 3 workers performing the milling, or grinding, of the pavement, using a milling machine.

Those workers were employed by a subcontractor, Coady Construction, Inc., of Columbus, Ohio. The remaining employees worked as a clean-up crew. They would follow the milling machine and clean up the roadway of dust, tar, and debris. These employees worked for West Virginia Paving.

6. On the nights of May 3 and 4, 2005, the milling operation was performed along the section of Route 60 directly adjacent to C&O's new and used car lots.

7. During this milling operation, dust, debris, and tar was churned up, became airborne, and was deposited onto a substantial number of C&O's vehicles which were parked in its new and used car lots.

8. C&O cleaned up some of the vehicles using its own staff—those which mostly had dust or debris on them. However, there were many vehicles which were splattered with tar which could not be removed by a simple washing.

9. C&O contracted out the cleaning of these vehicles to San-Chem LLC. Workers from San-Chem would come and get the vehicles from C&O's lots and take them to its facility for cleaning. C&O worked out a deal with San-Chem wherein it would pay a flat rate of $40.00 per car for cleaning.

10. San-Chem cleaned vehicles for C&O from May 20 through July 13, 2005, for a total of $5,740.00.

11. C&O first notified West Virginia Paving of its claims and injuries on or about May 25, 2005.

12. C&O presented West Virginia Paving with an invoice for $5,740.00, and requested West Virginia Paving reimburse it for the cost of cleaning its vehicles.

13. West Virginia Paving refused to reimburse C&O for those charges.

14. Charles Wilson Crane, Jr. is the General Manager of West Virginia Paving. Mr. Crane decided not to reimburse C&O Motors for the costs incurred in cleaning its new and used vehicles.

15. Mr. Crane does not dispute that C&O suffered damage to its vehicles as a result of the milling operation on May 3 and 4, 2006.

16. Mr. Crane does not dispute that C&O contracted out the cleaning of its vehicles to San-Chem.

17. Mr. Crane does not dispute that C&O incurred the charges set forth on the invoices sent to West Virginia Paving.

ASSIGNMENTS OF ERROR PRESENTED BY PETITIONER

I. The Circuit Court erred by affirming the moving party's request for summary judgment when there are clearly material issues as to who the responsible party is, and what percentage of comparative negligence exists among the parties.

II. The Circuit Court erred by not granting Petitioner's Motion for Joinder to join the sub-contractor, Coady Construction, Inc., which performed the milling operation in question.

STANDARD OF TRIAL COURT

When ruling on a motion for summary judgment, the trial court must determine whether there is a genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law. *Floyd v. Equitable Life Assurance Soc'y*, 164 W. Va. 661, 264 S.E.2d 648 (1980).

A motion for summary judgment under Rule 56 of the West Virginia Rules of Civil Procedure should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law. *Aetna Cas. & Sur. Co. v. Federal Ins. Co.*, 148 W. Va. 160, 133 S.E.2d 770 (1963).

DISCUSSION

I. The Circuit Court Correctly Found West Virginia Paving Was Negligent In This Matter.

In order to establish a *prima facie* case of negligence in West Virginia, it must be shown that the defendant has been guilty of some act or omission in violation of a duty owed to the plaintiff. No action for negligence will lie without a duty broken. Syl. Pt. 5, *Lockhart v. Airco Heating & Cooling, Inc.*, 211 W. Va. 609, 567 S.E.2d 619 (2002); *see also* Syl. Pt. 1, *Parlsey v. General Motors Acceptance Corp.*, 167 W. Va. 866, 280 S.E.2d 703 (1981); Syl. Pt. 4, *Jack v. Fritts*, 193 W. Va. 494, 457 S.E.2d 431 (1995).

The determination of whether a defendant in a particular case owes a duty to the plaintiff is not a factual question for the jury; rather the determination of whether a plaintiff is owed a duty of care by a defendant must be rendered by the

court as a matter of law. Syl. Pt. 3, *Lockhart, supra;* Syl. Pt. 5, *Aikens v. Debow*, 208 W. Va. 486, 541 S.E.2d 576 (2000).

One who engages in affirmative conduct which a reasonable person would recognize exposes others or their property to a risk of injury and/or harm is under a duty to exercise reasonable care to prevent the threatened harm. Syl. Pt. 6, *Lockhart, supra*; Syl. Pt. 2, *Robertson v. LeMaster*, 171 W. Va. 607, 301 S.E.2d 563 (1983).

The ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised. The test is, would the ordinary man in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result? Syl. Pt. 7, *Lockhart, supra;* Syl. Pt. 3, *Sewell v. Gregory*, 179 W. Va. 585, 371 S.E.2d 82 (1988).

In the matters of negligence, liability accrues to a wrongdoer, not because of a breach of a contractual relationship, but because of a breach of duty owed which results in an injury to others. Syl. Pt. 8, *Lockhart supra;* Syl. Pt. 2, *Sewell, supra.*

Where one plans a work which necessarily involves a trespass on premises of another, he cannot justify the wrongful act by the plea that the work is done by an independent contractor. Syl. Pt. 2, *Sun Sand Co. v. County Court of Fayette County*, 96 W. Va. 213, 122 S.E. 536 (1924).

Where the resultant damages are such as might have been reasonably contemplated as a consequence of the work directed to be done, the employer of an independent contractor doing the work is liable. *Sun Sand Co., supra.*

The protection afforded private persons in the possession, use and enjoyment of their property by Article III, Section 9 of the Constitution of this Sate prevents the damage of private property for public use without just compensation. A defendant cannot escape liability for damage to abutting land consequent to such improvement on the ground that another agency without supervision and control actually did the work. *Morgan v. City of Logan*, 125 W. Va. 445, 24 S.E.2d 760 (1943).

Charles Wilson Crane, Jr., now-General Manager of West Virginia Paving, Inc., was the General Superintendent over the Route 60 paving project (the "Project"). He was responsible for scheduling, job costing, material procurement, margin forecasting, and visited the site at least every other shift during the operation.

The milling portion of the Project commenced in the Town of Jefferson on or about April 25, 2006. The milling operations were performed at night to reduce traffic problems. The operations proceeded west on Route 60 from the Town of Jefferson, and by May 3, 2006, had reached the portion of Route 60 running adjacent to the C&O properties. It took two nights to mill that portion of Route 60, before again moving westward towards the Amandaville Bridge, where the project culminated.

West Virginia Paving entered into a contract with its subcontractor, Coady Construction ("Coady"), out of Columbus, Ohio, to perform the milling portion of the Project. Coady brought its milling machine, a service truck and a water truck to the Project. The milling machine actually tears up the road.

The first thing that happens in a milling operation is that the subcontractor, in this case, Coady, sprays water on the milling head, which is the piece with teeth on it. The purpose of the water is for cooling and dust control. West Virginia Paving follows behind the milling machine with a loader with an enclosed broom attachment. The broom attachment gathers debris into a bucket which is then poured into a truck. Sometimes a grader will also be used for clean up. The grader will collect the material into a pile, which then can be picked up by the broom attachment. West Virginia Paving also utilized a tractor broom and a rubber-tire backhoe for the purpose of picking up debris off the road surface.

Mr. Crane admitted that, despite these efforts to minimize the amount and dust and debris, there is still an amount of dust and debris that does not get self-contained by the process described above.

According to Mr. Crane, if someone had a complaint about one of their projects, the complaint would be forwarded to a claims person, Lori Hall. She would ask someone involved with that particular operation about the legitimacy of the claim, and if the claim was deemed legitimate "based upon our . . . gross negligence or some type of accident," a decision would be made whether to compensate that individual or not

C&O did not call West Virginia Paving to complain. C&O did not speak with Lori Hall. C&O made arrangements for their vehicles to be cleaned, procured the invoices from San-Chem, who did the cleaning, and then sent its own invoice to West Virginia Paving for reimbursement. At no time did anyone at West Virginia Paving attempt to contact anyone at C&O about the invoices, or advise them that they could file a complaint by calling Lori Hall. Rather, West Virginia Paving, through its then-controller, Scott Withrow, sent the invoices back to C&O saying he did not know what they were.

C&O's counsel telephoned Scott Withrow to explain the invoices. Mr. Withrow indicated he would need additional evidence of damage, and so photographs of the vehicles were forwarded to him. Mr. Withrow subsequently advised C&O's counsel that West Virginia Paving would not reimburse C&O for the damage to its vehicles. Again, at no time did Mr. Withrow ever advise C&O or its counsel that there was some formal claim process which it needed to go through in order to have its claim reviewed.

Mr. Crane was the one who made the decision not to reimburse C&O for the damage to its vehicles resulting from West Virginia Paving's operations on Route 60. One factor which he considered was that C&O did not file its claim through the appropriate West Virginia Paving channels. Another factor he considered in denying the C&O claim was the timeliness in which C&O notified West Virginia Paving of the damage.

Mr. Crane admitted there was no written policy at West Virginia Paving as to how complaints are handled. As to the timeliness factor, the milling operation

which caused the debris to be deposited on C&O's vehicles occurred on the nights of May 3 and 4, 2005. The first invoice C&O addressed to West Virginia Paving is dated May 25, 2005. Mr. Crane concedes that amount of time would not be considered untimely.

Finally, Mr. Crane conceded that the milling operation caused the tar residue to become adhered to the C&O vehicles, that C&O incurred costs associated with having those vehicles cleaned, and that C&O's claim was legitimate.

The Circuit Court found that, based upon these facts and concessions by Mr. Crane, there was not one issue of material fact to be resolved in this matter. It was merely a question of applying the facts to the law. Based upon Mr. Crane's testimony and his own admissions, the Circuit Court found:

1) The escape of dust and tar was a foreseeable result of the Defendant's work;

2) The Defendant had a duty to prevent foreseeable harm to adjoining property owners;

3) The Defendant breached this duty;

4) Plaintiff's vehicles suffered damage as a result; and

5) The amount of the cleaning charges was not disputed and was conceded to be reasonable.

In making the finding that West Virginia Paving was negligent in causing the damage to C&O's vehicles, and liable for the costs incurred by C&O in the

clean-up of the vehicles, the Circuit Court also necessarily found that there was no comparative negligence on the part of C&O.

West Virginia Paving argues that the Circuit Court's decision in this matter renders West Virginia Paving strictly liable for all future paving operations. This argument is nothing more than a smokescreen and an attempt to give this case and decision more import than it deserves. The Circuit Court made no finding that West Virginia Paving was strictly liable for damages caused by its paving operations. The Court merely looked at this particular situation and these particular facts in making her decision. This is a simple negligence case and nothing more.

B. The Circuit Court Did Not Err In Denying West Virginia Paving's Motion for Joinder.

West Virginia Paving argues that the Circuit Court should have required C&O to join the sub-contractor, Coady Construction, Inc., as a defendant in this lawsuit, on the grounds that Coady is a necessary party pursuant to Rule 19 of the West Virginia Rules of Civil Procedure.

C&O argued, and the Circuit Court agreed, that *W. Va. R. Civ. Pro.* 14 more appropriately governs the issue of whether Coady could and/or should be joined as a party defendant. Rule 14 states, in pertinent part:

> (a) *When defendant may bring in third party.* - At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff.

Subdivision (a), above, may not be used to require a plaintiff to sue a person whom he originally might have joined as a defendant and whom he chose not to join. *Maxey v. City of Bluefield*, 151 W. Va. 302, 151 S.E. 2d 689 (1966).

West Virginia Paving and Coady entered into a Subcontract Agreement ("Agreement"), dated April 7, 2005, wherein West Virginia Paving is designated as the "Contractor" and Coady is designated as "Subcontractor." That Agreement contains a section entitled "Liability and Indemnification" by which the Subcontractor agrees to indemnify the Contractor for any loss or casualty incurred or caused by Subcontractor.

West Virginia Rule of Civil Procedure 19 governs the joinder of persons needed for just adjudication. West Virginia Paving argued that Coady's presence is required under this Rule. The test for determining whether a party should be joined under this Rule is whether:

> (1) in the person's absence complete relief cannot be accorded among those already parties; or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest, or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

This matter did not require Coady's presence to give complete relief to the existing parties, nor did Coady's absence subject the existing parties to a substantial risk of multiple or inconsistent obligations, and Coady has not expressed an interest in this action. That is the test for deciding whether an absent person should be joined. West Virginia Paving offered no factual basis as required under Rule 19 to force C&O to join Coady.

If, in fact, West Virginia Paving had wanted to hold Coady responsible for the damage done to C&O's vehicles as a result of the paving project on Route 60 in St. Albans, then West Virginia Paving needed to join Coady as a defendant under the Subcontract Agreement and Rule 14.

CONCLUSION

The trial court, after reviewing the record, the briefs, and the argument of counsel, correctly concluded that C&O had proved that West Virginia Paving was negligent in its paving operations which caused damage to C&O's vehicles. The trial court also correctly held that C&O had no legal duty to join Coady Construction, Inc. as a defendant in this matter, but could proceed against West Virginia Paving alone.

WHEREFORE, C&O respectfully requests that this Honorable Court deny West Virginia Paving's Appeal, and affirm the decision of the trial court below.

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By Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Response to Petition for Appeal was served this 22nd day of April, 2008, on the Petitioner by U.S. Mail deposited postage prepaid and addressed to:

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Mary Jo Swartz, Esq.